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IN THE

Supreme Court of the United States

October Term, 1954

DOCKET No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Introduction

With leave of the Court, granted upon the argument of this appeal, we submit this supplemental brief on behalf of the State of New York.

Our discussion is limited to the validity of Section 903 of the New York City Charter and its impact upon the facts and circumstances disclosed in this record.

In limine, we emphasize that Section 903 was not specifically challenged by petitioner in any proceeding in the State courts and is therefore not cognizable *sub judice.*

In *Whitney* v. *California*, 274 U. S. 357, the resident power of review in this Court was limited not only to the deprivation of a federal right but "to the particular claims duly made below and denied" (p. 380).

Accord:

Beauharnais v. *Illinois*, 343 U. S. 250;
Adler v. *Board of Education*, 342 U. S. 485, 496;
Barsky v. *Board of Regents*, 347 U. S. 442, 456;
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sections 66, 77, 79.

The contention advanced by petitioner upon oral argument that the statute as applied to the facts at bar is repugnant to his rights, constitutionally guaranteed, does not draw in question the validity of the enactment.

Robertson and Kirkham, ibid., page 26;
Charleston Federal Savings and Loan Assn. v. *Alderson*, 324 U. S. 182, 184-187;
Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. 1, 4-6.

We stress with equal resolution the proposition that infringement of the privilege against self-incrimination in a state court is not interdicted by the Due Process clause of the Fourteenth Amendment. Not only that privilege *per se*, but all incidents and ancillary aspects thereof, such as waiver or abandonment of immunity, similarly do not posit a federal question.

Adamson v. *California*, 332 U. S. 46;
Twining v. *New Jersey*, 211 U. S. 78;
Palko v. *Connecticut*, 302 U. S. 319.

These prefatory observations made, we proceed to the problem at hand.

POINT I

Section 903 of the New York City Charter is a valid exercise of government prerogative and legislative power.

The New York City Charter Revision Commission pursuant to Chapter 867 of the Laws of 1934, proposed a new and comprehensive charter for the conduct of the City of New York. It was adopted by referendum on November 3, 1936 and became effective January 1, 1938. Section 903 thereof provides:

> "Sec. 903 *Failure to testify*—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

The cardinal objective of this statute is to facilitate a grand jury inquiry into the administration of public

office and official behavior. An investigation could be frustrated or seriously impeded, absent testimony of the officer himself. A witness' reliance upon his constitutional privileges could effectively bar access to this avenue. Therefore, the legislature imposed liability to forfeiture of office to insure a broader and more comprehensive scope of grand jury investigation.

It is not a capricious or arbitrary parade of legislative authority. It promulgates a fair and reasonable standard of public employment, calculated to accomplish a beneficent, communal purpose. A municipal employer may properly inquire "of its employees as to matters that may prove relevant to their fitness and suitability for the public service" (*Garner* v. *Los Angeles Board of Public Works,* 341 U. S. 716, 720). The scope of inquiry under Section 903 and the conduct demanded of a city employee is restricted and defined in narrow terms. His account is expressly limited to his *official* conduct. There is no encroachment upon his private life, nor is he compelled to reveal activity unrelated to the discharge of the duties of his office.

A disclosure unaccompanied by the sanction of punishment for revealed criminal misconduct would be woefully ineffectual. Hence the statute requires of city employees that they waive immunity from prosecution in accounting for official conduct before a grand jury or other legally constituted investigative body.

The penalty imposed by the enactment for refusal to execute a waiver is forfeiture of office and ineligibility to future public employment.

We urge that Section 903 is a reasonable declaration of a sensible and intelligent civic purpose. A police officer is specifically enjoined to enforce laws against gambling. His city employer calls upon him to reveal whether in the discharge of his duties, he had accepted bribes to permit gamblers to ply their illegal trade without molestation. He refuses to account unless the city promises in advance that he will not be prosecuted for disclosing that he had received graft. Could anyone reasonably deny the municipality the right to dismiss that police official under these circumstances? This is the sole purport and operative effect of Section 903. The city is empowered to forfeit the office of its employee who refuses to account before a grand jury under a waiver of immunity. Assertion that Section 903 violates a constitutional mandate is to reject the prerogative of a city to discharge a faithless, disloyal and criminal employee and to affirm his vested right to continued employment. *O tempora! O mores!*, that would tolerate or accept a result so maleficent.

In *McCauliffe* v. *New Bedford*, 155 Mass. 216, Mr. Justice Holmes enunciated a classic principle in sustaining the right of a municipality to discharge a police officer for engaging in proscribed political activity. At page 220 he said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

Mr. Justice Douglas speaks of the "pernicious implication" of the foregoing dictum in *McCauliffe* anent the constitutional right to public office (*Barsky* v. *Board of Regents*, 347 U. S. 442, 472). We respectfully urge that the denial of vested right to *public* employment does not connote that a "man has no constitutional right to work" and that adherence to the former principle would not render the latter inevitable. A dichotomy of employment into "private" and "public" suggests reasonable and intelligent distinctions between these categories. The differences are not obscure. To dilate upon them, we think, would be a work of supererogation. One vital phase of divergence lies in the area of influence of the disloyal employee. A recreant servant in private industry affects only the business of the individual employer. The faithless public servant disturbs the welfare of countless thousands.

The test of the validity of Section 903 of the New York City Charter is its reasonableness. In *Barsky, supra,* a New York law which authorized disciplinary action against a physician convicted in a court of competent jurisdiction of a crime "meets the charge of unreasonableness" (p. 452). Laws imposing pledges of fealty as a condition of public employment have been sustained against constitutional attack.

In *Garner* v. *Los Angeles Board of Public Works, supra,* the city had established as a qualification of employment a pledge of loyalty to the state and the United States. Said this Court at pages 720 and 721:

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal

> service . . . the amendment was reasonably designed to protect the integrity and competency of the service . . . The Charter amendment defined standards of eligibility of employees and specifically denied city employment to those persons who thereafter should not comply with these standards."

Mr. Justice Frankfurter concurring and dissenting in part in *Garner* said at pages 724, 725:

> "The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs."

At bar, Section 903 "in the context of our time" is "sufficiently relevant to effective and dependable government and to the confidence of the electorate in its government" (*Garner*, p. 725).

In *Canteline* v. *McClellan*, 282 N. Y. 166, the Court of Appeals in New York sustained the validity of a provision in Article 1 Section 6 of the State Constitution requiring public officers to execute waivers of immunity when testifying as to official conduct before a grand jury.

This Court in *Adler* v. *Board of Education*, *supra*, speaking of persons employed in public schools of the State of New York, said (342 U. S. at 492):

> "It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York."

Of course, we do not urge "the facile generalization that there is no constitutionally protected right to public employment" (Mr. Justice Clark in *Wieman* v. *Updegraff*, 344 U. S. 183, 191).

We regard as a truism that "unreasonable discrimination, if avowed in formal law, would not survive constitutional challenge" (Mr. Justice Frankfurter in *Garner, supra*, at 725). But the egis of the Federal Constitution does not envelop the public servant unless the statutory definition of the requisites of office are "patently arbitrary or discriminatory" (*Wieman, supra*, at 192).

It is our conviction that Section 903 of the New York City Charter, which sanctions the discharge of a public employee who refuses to account for his official activities unless guaranteed immunity from prosecution, suffers no greater constitutional infirmity than a statute permitting the discharge of a public servant who advocates the overthrow of our government by force and violence or for engaging in proscribed political activity. Each is "reasonably designed to protect the integrity and competency of the service." The statute is reasonable because it is fit and appropriate to the end in view.

> *Parkes* v. *Judge of Recorder's Court*, 236 Mich. 460, 210 N. W. 492, 494.

Petitioner's contention that Section 903, *ex proprio vigore*, exerts wrongful compulsion in contravention of the due process clause in the Fourteenth Amendment, should be rejected.

POINT II

The application of New York City Charter Section 903 to the petitioner upon the specific circumstances disclosed in this record did not deprive him of due process or any constitutional privilege.

Petitioner argued upon this appeal that the collective factors evinced in this record, including the alleged coercive effect of Section 903 and the procedure in the execution of the waiver of immunity encroached upon the rights guaranteed to him under the due process clause of the Fourteenth Amendment.

If the statute is a valid exercise of legislative authority, duress, as a cognizable, legal or equitable defense, cannot be predicated upon it, since the pressure would not be wrongful.

It has been suggested that petitioner was confronted with an intolerable dilemma on January 5, 1953, when he was directed by the County Court to testify before the Grand Jury under an effective waiver of immunity.*

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* The waiver recites that it is executed pursuant to New York Penal Law Section 2446 (R. 145, fol. 435). Section 2446 reads:

"Sec. 2446. Waiver of immunity.

If it be provided by this chapter or any other general or special law that a person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, or that testimony so given or produced shall not be received against him upon any criminal investigation, prosecution or proceeding, such person may execute, acknowledge and file in the office of the county clerk a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such

Truthful testimony might indicate bribery; false evidence would invite perjury prosecution; refusal to testify would subject petitioner to punishment for contempt. Any course he pursued, inevitably would lead to prison. This quandary in which petitioner contends he was placed constituted, he argues, denial of due process.

Refutation is readily at hand. The status of any person who waives the benefits of immunity statutes under any circumstances would be identical with petitioner's. Every executor of a waiver of immunity *ipso facto* is confronted with the possibility of prosecution for the substantive crime (bribery, larceny, homicide, as the case may be), if he testifies truthfully; perjury for false testimony and criminal contempt for deliberate refusal to testify. If such an impasse would validly support a claim of invasion of constitutional rights, then no waiver of immunity could ever withstand attack. In effect, the benefits of an immunity statute could never expressly, legally be waived, thus doing violence to the universally accepted principle that privilege against self-incrimination or the correlative benefits conferred by a statute which destroys or supplants the privilege (at bar, New York Penal Law Sections 996, 584, 381) may be relinquished, abandoned or waived.

Wigmore in his monumental tome on Evidence, 3rd Edition, Volume 8, Section 2275 at page 435, says of the privilege against self incrimination that "It has never

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evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such person shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

been doubted that the privilege like all privileges . . . is in itself *waivable*". To the same effect:

> *Brown* v. *Walker*, 161 U. S. 591, 597;
> *Report, Law Revision Commission of the State of New York*, 1942, page 373.

If appellant voluntarily, consciously and intelligently waived the benefits of the immunity conferred upon him by the foregoing sections of the New York Penal Law, he should not now be heard to complain of the consequences or that they were more onerous than he might have anticipated. *Volenti non fit injuria.*

We are then to return to the basic question whether the effect of Section 903 of the City Charter in conjunction with the other attendant circumstances disclosed in the record operated to deprive petitioner of conscious choice and illegally coerced him into executing the waiver and whether, thereby, due process was denied to him.

We iterate the objection urged in our main brief that the record does not reveal the profession of that claim in any prior proceeding in the state courts and in addition, that there is no record evidence to support such claim if it be deemed asserted. We do not imply that the only acceptable evidence could emanate from petitioner himself. We do contend, however, that at least the attendant circumstances should clearly manifest and ineluctably support a conclusion that the waiver resulted from oppression. No such irresistible inference can be adduced here.

Implicit in the verdict of guilt based upon the evidence and the law as charged by the Court is the finding by the jury that petitioner, consciously, intelligently, intention-

ally and with full comprehension of the risk invited, waived the benefits conferred upon him by the immunity statutes. Discussing "coercion" a savant in the law said:

> "Freedom, however, is a matter of degree and it is no easy task to define the boundary line that must be recognized by a rational system of law. We can only say generally, that there must be such liberty of choice as to create a reasonable presumption that the party exercising it has chosen that which he desires, and not merely submitted to that which he cannot avoid."
>
> *Salmond, Jurisprudence,* 7th Ed. page 371.

Of course, the word "desires" in this reference is not to be equated with "palatable" or "pleasing". Petitioner chose to execute the waiver. He preferred and desired that course to the one which would forfeit his office as a policeman.

Unlike the tests imposed as a condition of employment in *Garner, Adler* and other loyalty oath cases where the statute was enacted *after* tenure in office had attached, at bar, Section 903 of the New York City Charter was formulated in 1938, whereas petitioner entered the Police Department in 1942 (R. 75, fol. 225). He commenced employment with knowledge that one of the conditions of continuance in office was that he waive immunity when called upon to account for his official conduct before a grand jury. This statutory condition is the legal equivalent of a proviso contained in an express written contract between petitioner and the City of New York, were such contract formalized. The consideration therefor was acceptance by

the City of petitioner as a police officer. In effect, when petitioner was appointed to the police force, he agreed to execute a waiver of immunity in a proper investigation or surrender his status as a member of the Police Department.

It was maintained upon this appeal that the County Court afforded petitioner only an illusory choice, "Where to elect there is but one, 'tis Hobson's choice,—take that or none". Whether he would testify truthfully, falsely or not at all, his decision, petitioner argued, would lead inevitably to jail. But when the Judge of the County Court directed petitioner to testify under a valid waiver or be punished, he did not impose any new or added condition that defendant should testify or be imprisoned for refusal or be prosecuted if he confessed to a crime. The Judge was simply defining and clarifying an obligation which petitioner had *previously* voluntarily and intelligently assumed, the waiver of immunity. The proceedings before the County Court on December 22, 1952, and January 5, 1953, were to determine whether petitioner was required to testify under a waiver and to clarify, not to create, his status (R. 127-130, fol. 383).

It is said that the privilege against self-incrimination may be waived by contract or other binding pledge before trial and that it is irrevocable unless the circumstances bring it within the doctrine of duress or oppression and is therefore voidable on customary principles of contract.

Wigmore, Evidence, *supra,* Vol. VIII, page 435.

The course of our argument now leads to discussion of the operative extent of the waiver in point of time. It was

suggested upon this appeal that petitioner in executing the waiver of immunity had *forever* relinquished his rights.* Opprobrium is attached to this incident of the waiver. Assuming, *arguendo*, that the waiver did operate indefinitely in the future, we do not believe that thereby a Federal question is raised. If petitioner intentionally and knowingly executed the document and was not compelled to do so by circumstances which the law recognizes as duress, wherein was he denied any right or privilege "implicit in the concept of ordered liberty"?

At any rate, treatment of the prospective effect of the waiver and its duration requires analysis of the concept of relinquishing rights forever. The term "forever" is susceptible of dual connotation. It may imply:

1. That petitioner waived the benefits of the immunity statutes for any crime which he might commit *after* the delivery of the waiver, which construction might pose grave constitutional questions; or

2. That he waived forever all immunity from prosecution as to *past* offenses, a version not repugnant to due process.

Clearly the waiver did not apply to future offenses. Petitioner did not agree to submit to prosecution for crimes he might commit after the execution of the waiver. The document at bar is not reasonably subject to that interpretation. The New York statutes of bribery, conspiracy and gambling accord immunity from prosecution to any witness called in a grand jury investigation into those crimes for all *past* offenses of whatever nature, when

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* Petitioner executed the waiver of immunity on March 7, 1951. Contempt was committed in December, 1952 and January, 1953.

his testimony is responsive to relevant interrogation (*United States* v. *Kohriger*, 345 U. S. 22, 32). The immunity statutes do not promise a witness that he will not be prosecuted for crimes he may commit at any time in the future. It is this immunity from prosecution for *past* offenses and only this which the statutes accorded petitioner. It is this and only this immunity which he waived by executing the document at bar. In the first sense of our interpretation, petitioner's waiver was not effective forever.

The second connotation of waiving freedom from prosecution to which we have alluded, is that petitioner surrendered forever his right not to be prosecuted for *past* offenses. We observe no constitutional debility in this aspect.

Petitioner agreed in the waiver of immunity that if he were ever indicted for any past offense which he might disclose to the Grand Jury or to which his testimony might furnish a link, *he would not urge as a defense* to such prosecution that the indictment was illegal because the state had promised him immunity in exchange for his testimony and that the indictment was a breach of that guarantee and his privilege against self-incrimination. Absent the waiver of immunity, petitioner could not be prosecuted in the future because the grand jury investigation, in which he had been compelled to testify, concerned crimes as to which the Penal Law of New York accorded him security against indictment. Petitioner relinquished these prospective benefits by the execution of the waiver. He abandoned a contingent defense in advance. This was the limit and the total operative area of that instrument.

It is to be noted that he did not thereby relinquish or promise to forego any other defense available to him in such future prosecution. Despite the waiver, he could plead as a defense to prosecution, the Statute of Limitations, alibi or any other circumstances legally recognized as a defense in any prosecution which is not affected by a waiver of immunity. For all practical purposes, petitioner's waiver was effective for any period of time short of the Statute of Limitations, but not forever. We do not discern the virus of unconstitutionality in the foregoing analysis or interpretation of the waiver of immunity.

However, we do not believe that any fixed, artificial period of time should be the conclusive criteria upon which the validity of a waiver is made to depend. No intelligent standard of time could be established. Would a waiver be valid if it is effective for one day, one week, one month, one year, but constitutionally deficient if it is deemed valid for two days, two weeks, two months or two years? Why should the mere fact that some twenty-two months elapsed between the execution of his waiver and petitioner's refusal to testify vitiate his relinquishment of benefits conferred by the immunity statutes? Logic and reason reject the element of time as an acceptable measure of the validity of the waiver.

We suggest a different criterion, which, we believe, is realistic and intelligible. That is, *the duration or course of the judicial investigation.* At bar, the grand jury was inquiring into bribery of police officials by gamblers (R. 91). It commenced this investigation in December, 1949 and it was still continued by the same grand jury into January, 1953, when petitioner refused to testify (R. 81-

83). Petitioner's waiver was effective continually during the course of the same investigation in which he was originally called to testify. Differently expressed, once petitioner executed the waiver, then, whenever he testified (here twenty-two months later), whenever he disclosed criminal activity, he waived immunity from prosecution on account thereof, provided the testimony adduced was before the same grand jury conducting the same inquiry. Those are the circumstances at bar and that is the logical, sensible standard for appraisal of the prospective effectiveness of the waiver. A different estimate would invite the absurd conclusion that a witness before a grand jury, conducting an investigation two days in duration, but testifying on four different occasions in that period, would be required to execute four waivers. Our conviction that a waiver is effective for the entire course of a particular investigation is supported by respectable authority.

People ex rel. Hofsaes v. *Warden of City Prison,* 302 N. Y. 403;
People v. *Cassidy,* 213 N. Y. 388;
Report, Law Revision Commission of the State of New York, 1942, page 373.

What legal efficacy the waiver of immunity in the form signed by petitioner would possess, if he were compelled to testify before another grand jury conducting an independent investigation into totally different or unrelated matters, presents an abstract proposition which this Court is not now called upon to appraise.

At bar, petitioner's delivery of the waiver and subsequent refusal to testify occurred before the same December, 1949, Grand Jury, conducting the very inquiry into

official, police corruption. We perceive no denial of fundamental rights or basic principles of justice in holding petitioner to his waiver despite the length of time intervening between its execution and his failure to testify. The County Court was correct in its determination that the waiver then and there and in that proceeding was effective and petitioner's refusal to comply with its directive and to testify constituted punishable contempt under New York Penal Law, Section 600.

We maintain that this record does not evince any invasion of petitioner's constitutional rights because of, either, the intrinsic nature of the waiver or the mechanics of its execution.

It is regrettable that the idea of due process is not susceptible of precise delineation. Text and decisional authority have imparted to the concept of due process an accordion-like quality, expanding and contracting as the exigencies of particular facts may require, according to the pragmatical notions of decent behavior and "fundamental fairness" which an individual judge may entertain. Perhaps in this elasticity, in this singular adaptive capacity, is the genius in our system of law manifest.

We urge that whatever the proper norm of conduct to be applied to the facts and circumstances *sub judice*, petitioner was not denied due process or deprived of any constitutional right or privilege.

CONCLUSION

The judgment of conviction should be affirmed.

Dated, Brooklyn, New York
November, 1954

Respectfully submitted,

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